SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-2067

BEVERLY CAMP SIMPSON,

Petitioner,

v.

JOHN G. SIMPSON, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

Petitioner refers to the direction of a verdict by the trial court in favor of Respondent. In directing a verdict for the Respondent, the trial court stated its reasons for doing so to the jury. A copy of the trial judge's remarks in so instructing the jury is included in the Appendix to this Brief, *infra.*

JURISDICTION

Respondent concedes the jurisdiction of this Honorable Court, but says that there are no special and important reasons for granting certiorari, as required by Supreme Court Rule 19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions involved which are specified on page 2 of Petitioner's Brief, the case involves the provisions of the Code of Alabama 1940 (Recompiled), Title 34, §72, which reads:

> "The wife must sue alone, at law or in equity, upon all contracts made by or with her, or for the recovery of her separate property, or for injuries to such property, or for its rents, income, or profits, or for all injuries to her person or reputation; and upon all contracts made by her, or engagements into which she enters, and for all torts committed by her, she must be sued as if she were sole."

QUESTIONS PRESENTED

Petitioner has not precisely defined, in the paragraph numbered 1 of her Brief, under the heading "Questions Presented", the question intended to be presented for review, in the terms and circumstances of the case. A proper statement of the question would be:

1. Whether a husband, who, while living with his wife in the conjugal relation in a common dwelling house in the State of Alabama, became suspicious of his wife's fidelity, and who, unknown to the wife, and without her actual consent to do so, intercepted and recorded telephonic wire communications between his wife and her suspected lover,

made over the family telephone, in the family residence, and there intercepted, he being the subscriber for the family telephone service, violated 18 U.S.C. §2511.

In addition to the questions raised by Petitioner, there is presented to this Court for review the question of whether, assuming the applicability of 18 U.S.C. §§2510, 2511, and 2520 to the facts and circumstances of the case, as a matter of statutory construction and legislative intent, there was sufficient legal evidence of the elements of Petitioner's cause of action admitted at the trial of the case to require the case to be allowed to go to the jury, and which would support a jury verdict against the Respondent.

STATEMENT OF THE CASE

Reference will be made herein to the record on appeal to the Fifth Circuit Court of Appeals. Respondent will refer to the record by the abbreviation "R", followed by the numbered pages of the record, *e.g.*, (R-3), and, if reference is made to the transcript of the trial, Respondent will refer to the transcript by the letter "T", followed by the page number of the transcript, *e.g.*, (T-12).

At the time Respondent did the acts upon which the suit was based, the parties were husband and wife, living together with their daughters, in a common dwelling house (T-68-70). The parties were divorced on or about May 7, 1971 (T-51).

There were two telephones in the parties' dwelling house. One telephone was in the dining room, and the other was in the children's dressing room (T-191-192). One telephone was an extension of the other (T-191). The telephones were listed and installed in Mr. Simpson's name at the direction of his wife.

Several months before the alleged "wiretapping" incidents, Respondent became suspicious of his wife's fidelity to her marriage (T-141, 142, 147, 185). She had brought up the subject of divorce previously (T-141). Respondent had seen Petitioner and one Maurice Mayer together (T-141). The parties' sex life together had become relatively inactive (T-143-144). Respondent had seen Petitioner and Mayer kissing each other (T-147-148). However, Petitioner and Respondent had been married to each other for twenty-one years (T-144), and Respondent thought it was possible that Petitioner was not actually engaged in an "affair" with Mayer (T-142). Petitioner knew of her husband's suspicions, but she nevertheless continued to be receptive to Mayer's advances (T-185-188). In late March, 1971, or early April, 1971 (T-129), in order to determine if he was unreasonably suspicious of his wife's fidelity, Respondent attached a "device", which he had made himself, to his "telephone line for the purpose of tapping" Mrs. Simpson's telephone conversations (T-128). The "device" was attached to a recording machine (T-129). The telephone signals were "recorded a little bit after they were recorded on the telephone by virtue of the type hookup that it was" (T-129). Thereafter, Respondent divulged the contents of the tape recordings of Petitioner's telephone conversations with Maurice Mayer, or portions thereof, to various friends and relatives of his and Mrs. Simpson (T-131-132; T-134-138), not to "neighbors" as stated in the opinion of the Court of Appeals. The alleged interceptions of his wife's telephone conversations with Mayer were without the knowledge or the express permission of Respondent's wife (T-133-134; 172).

After recording Petitioner's telephone conversations with Mayer, Respondent consulted Mr. John Tarver, a personal friend of both parties (T-50-51), and an attorney, and

Respondent told him of the recordings (T-56, 58). Mr. Tarver told Respondent that he would represent neither Respondent nor his wife "unless it was an agreed-upon divorce" (T-57), but he participated in negotiations between the parties regarding the terms of a divorce (T-62). Mr. Tarver filed suit for divorce as Petitioner's attorney (T-62), and testified that "I think I had represented both of them because I tried to be unbiased in my conversations with both of them . . ." (T-62).

The remainder of the evidence which is relevant to the elements of the offense charged to Respondent is merely cumulative of the above stated testimony, and no useful purpose would be served by further extending the summary. It is noted, however, that the remark appearing on page 4 of Petitioner's Brief to the effect that Petitioner "consented to a divorce decree under which she obtained no alimony and which eliminated all of her child custodial rights and most of her property rights," is not supported by any evidence which was admitted at the trial, and is merely a gratuitous, unsupported allegation of counsel, and same is wholly irrelevant to the issues presented by the petition.

There was no testimony tending to show the kind of "device" used by Mr. Simpson to record his wife's telephone conversations with Mayer. There was no testimony tending to show whether the "telephone line" to which the "device" was attached was the main line or was the line to the extension telephone. There was no testimony tending to prove that the communications which were allegedly intercepted by Mr. Simpson were made through the use of facilities "for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception *furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of inter-*

state or foreign communications." 18 U.S.C. §2510. Not even the name of the person, firm or corporation which furnished the telephone service to the Simpson home was mentioned anywhere in the testimony. There was no testimony tending to establish that Maurice Mayer, or the other parties to the alleged intercepted communications, did not give prior consent to the alleged interceptions.

On April 12, 1972, Petitioner sued Respondent for damages pursuant to 18 U.S.C. §2520 (R-2). Trial was on the general issue (R-4). The trial judge, on motion of Respondent, granted a directed verdict, ruling that, under the facts of the case, the law would imply consent on the part of the Petitioner to the interception, and that, under Alabama law, no tort had been committed by Respondent against the Petitioner in the interception by him of her telephone conversations for which suit could be brought against him by the Petitioner, thus bringing the case within the exception made by 18 U.S.C. §2511 (2) (d). The instructions of the trial court to the jury are set out in the Appendix to this Brief.

Respondent contended in his opposition brief filed in the Court of Appeals, and in oral argument, that not only did the statutes upon which Petitioner based her suit not apply in any state to the fact situation in the case, as the Court of Appeals held, but also, assuming the general applicability of the statutes, that:

1. The provisions of 18 U.S.C. §2520, conferring a civil cause of action upon "any person whose wire or oral communication is intercepted, disclosed, or used in violation of" 18 U.S.C. §§2510-2520, do not, as a matter of legislative intent, override the law of a state which does not permit one spouse to sue the other for such a tort committed during coverture, and that the law of Alabama would not per-

mit suit by one spouse against the other for the particular tort involved in this case.

2. Under the facts and circumstances of this case, the acts of the husband would not be a tort against the wife under state law, and the consent of the husband, as head of the household, and the subscriber to the telephone service, to the interception of Petitioner's telephone conversations would be the consent of the wife, as a matter of law, and thus bring the case within the exception of 18 U.S.C. §2511 (2) (d).

3. There was *no* evidence admitted at the trial that the "intercepted" communications of Petitioner were "made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier and providing or operating such facilities for the transmission of interstate or foreign communications", and that Petitioner thus failed to prove one of the elements of her alleged cause of action.

4. There was *no* evidence admitted at the trial that any party to the alleged "intercepted" communications had not given prior consent to the interceptions, and that Petitioner thus failed to prove an additional element of her alleged cause of action.

SUMMARY OF ARGUMENT

I.

To apply the criminal and civil sanctions of 18 U.S.C. §§2511, 2520, to the facts of this case would violate the fundamental principle of statutory construction that every statute must be interpreted and applied in the

light of reason and understanding to reach the results intended by the legislature.

If this suit can be maintained, this Court will hold that Congress intended that, in enacting 18 U.S.C. §§2511-2520, a spouse who, in his or her own home, intercepts a telephone communication of his or her own spouse with another person, made over his own telephone, without the express consent of the other spouse, is to be branded a felon, and fined up to five thousand dollars and imprisoned in the penitentiary for a period of up to five years, for each interception and publication of the communication, irrespective of motive. There is no civil cause of action under the "Wiretap Act", unless there is also criminal liability.

Petitioner contends that the words of 18 U.S.C. §§2510-2520 are so clear and explicit that they must be literally applied, irrespective of circumstances, and irrespective of consequences.

The first question is whether or not the statute must be given a literal application in all circumstances.

It is fundamental, and the lower appellate court said, that criminal statutes must be strictly construed "to avoid ensnaring behavior that is not clearly proscribed," and that this is a "basic due process principle."

The lower appellate court, after a "long and exhaustive search" of legislative materials, found very little, if anything, in the legislative history of the Act which would cast light on whether the lawmakers intended to make a crime of conduct such as that involved in this case, or even that the thought of the Act in connection with such conduct had occurred to them. In the absence of a legislative history indicating otherwise, it must therefore be presumed that Congress, knowing that criminal statutes are strictly construed, intended this Act to be strictly construed.

The Communications Act of 1934 was the precursor of the Act with which we are concerned here. In fact, the present statute is merely a revision of the former, which provided:

> "* * * No person not being authorized by the *sender* shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person * * *." (47 U.S.C. §605)

The above-quoted statute is equally comprehensive and sweeping on its face as 18 U.S.C. §2511. On the face of the Act, it would apply to any interception not authorized by the *sender*, and would apply if the *receiver* authorized the interceptions. On its face, it would apply whether or not the sender had a reasonable expectation of privacy, and whether or not he *should be entitled* to a reasonable expectation of privacy. This Court, however, rejected a literal application of the statute and held, in *Rathbun v. U. S.*, 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134, that the statute did not apply if the *receiver* authorized interception, saying that: "Every statute must be interpreted in the light of reason and understanding," and that principle would be violated "if we attributed to Congress acceptance of the result that would occur here from the position argued by Petitioner." The Act was likewise held not to proscribe long-standing business practices of communications companies (*United States v. Gallo* (C.C.A.N.Y.) 123 F.2d 229; *DiPiazza v. United States*, 415 F.2d 99, cert. den. 91 S.Ct. 1606, 402 U.S. 949; *Deming v. United States*, 91 S.Ct. 1606, 402 U.S. 949, 29 L.Ed.2d 119; *Bufalino v. Michigan Bell Telephone Company*, 404 F.2d 1023, cert. den. 89 S.Ct. 1468, 394 U.S. 987, 22 L.Ed.2d 763); that it did not prohibit a telephone company from monitoring a subscriber's calls, if the subscriber used the system's facilities in a man-

ner which reasonably justified the company's belief that he was violating his subscription rights (*Bubis v. United States,* (C.C.A. Cal. 1967), 384 F.2d 643); and that the Act did not prohibit a telephone company from monitoring its own lines to detect and prevent offenses against it by its own employees, (*Bufalino v. Michigan Bell Telephone Company,* 404 F.2d 1023, cert. den. 89 S.Ct. 1468, 394 U.S. 987, 22 L.Ed.2d 763).

The federal courts in effect refused to apply the sanctions of the Communications Act of 1934 unless there was both an expectation of privacy and *"a right to complain,"* as stated by Chief Justice Warren in *Rathbun v. U.S., supra.*

18 U.S.C. §2511 expressly incorporated therein several of the "exceptions" of the Communications Act of 1934 which the federal courts had found to impliedly exist therein, and Congress thereby impliedly approved and adopted the judicial interpretations which the courts had previously given to §605 of the Communications Act. Such include: (1) an interception of a wire communication by a communications common carrier in its normal course of business [18 U.S.C. §2511 (2) (a) (i)]; (2) the interception of a wire communication by a person who is a party to the communication, or by a person to whom one of the parties to the communication has given his prior consent to do so [18 U.S.C. §2511 (2) (d)]; and (3) an interception by use of an extension telephone furnished to the subscriber or user by the communications common carrier in the ordinary course of its business, and used by the subscriber or user in the ordinary course of its business [18 U.S.C. §2510 (5) (a)]. Such "exceptions" are illustrated by the authorities above cited.

Congress adopted 18 U.S.C. §§2510-2520 in the light of the judicial interpretations of 47 U.S.C. §605, the common thread of which was to apply the Act reasonably, and to re-

fuse to apply the punitive provisions of the Act unless a party to a wire communication was *justified in an expectation of privacy*. (*Rathbun v. U. S., supra*, and other authorities cited.) There are not, and cannot be, circumstances *justifying* an expectation of privacy of telephone conversations by members of a family unit vis-a-vis each other, if the communications are over a family telephone, and the members of the family live together in a common dwelling house. In particular, there can be no justification of an expectation of privacy in favor of a husband against his wife, or in favor of a wife against her husband, living together in a common household, and involving use of a family telephone, with respect to which the other spouse is the subscriber. Certainly, there can be no justification of privacy under such circumstances with respect to telephone communications by a spouse with his or her lover or would-be lover.

Under the provisions of 18 U.S.C. §§2510 (2), 2511, the present "Wiretap Act" does not apply to *oral* communications, unless the "intercepted" communication was "under circumstances justifying" an expectation of privacy. As indicated by the lower appellate court, it is unlikely that Congress intended to make a distinction in such respect between "oral" communications and "wire" communications. It is unlikely that Congress intended to extend federal law into the thicket of regulation of domestic relations and marital discord, an area traditionally a matter for the states under our federal system, and to enact a limited right of privacy of husband against wife and of wife against husband. Further, if 18 U.S.C. §§2510-2520 is applicable to the facts of this case, one of two results must necessarily follow: (1) the statute overrides the laws of the respective states which have not yet removed the common law disability of one spouse to sue the other in tort, or which have

retained the disability by statute, thus permitting suit in tort by one spouse against the other for violation of the Act, despite the law of the state retaining the disability, or (2) one spouse may sue the other for violation of the Act in those states which have removed the common law disability, but he may not sue in those states which have retained the disability. It is not likely that either result was contemplated by Congress, for the reason that it is improbable that Congress wished to enact a federal law, which, in practical effect, would override deeply entrenched state policies regarding the marital status, or, in the alternative, that Congress would adopt a statute which would not have uniform effect throughout the country.

II.

It is not a violation of the constitutional guaranty of "equal protection of the laws" for Congress to enact certain rights of privacy in favor of citizens generally, and to fail to provide for such rights in favor of one spouse against the other, where the two are living together as husband and wife in one marital domicile.

18 U.S.C. §§2510-2520 does not purport to take away from the Petitioner any right she would have enjoyed before the enactment of the statute, which merely confers a federal right of action based upon conduct with respect to which a right of action did not theretofore exist, unless by state statute.

Government need not treat married persons, even in their relationship with each other, precisely the same, and never has. Petitioner would have this Court, as a matter of federal constitutional law, abolish all common law and statutory disabilities of one spouse to sue another in tort, for if "equal protection of the law" requires the statute

to be extended to confer a right of action upon Petitioner in this case, it necessarily follows that "equal protection" nullifies the disabilities of one spouse to sue the other under state law. The social and political implications of such a ruling would be awesome indeed.

This Court has itself, in construing and applying a federal statute involving the District of Columbia, recognized that the law may treat married persons, and their relationships with each other, differently from single persons, and, with respect to the right of one to sue the other, in derogation of the common law, has held that a federal Married Women's Act will be strictly construed. (*Thompson v. Thompson,* 218 U.S. 611, 31 S. Ct. 111, 112, 54 L.Ed. 1180.) In the last cited case, this Court said:

> "It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the Legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention . . .
>
> We do not believe it was the intention of Congress, in the enactment of the District of Columbia Code, to revolutionize the law governing the relation of husband and wife as between themselves. We think the construction we have given the statute is in harmony with its language, and is the only one consistent with its purpose."

Marriage is voluntary, not involuntary, and therefore it does not, as urged by Petitioner, make the marriage ceremony an "involuntary renunciation" of the statutory pro-

tection against certain forms of privacy (Petitioner's Brief, p.14). "Equal protection of the law" does not require that, if the law permit one spouse to sue, it also permits the other spouse to sue, (*Nicholson v. Atlas Assurance Corporation* (La.App.), 146 So.2d 245). "Equal protection of the law" does not require that a wife be permitted to sue her husband (*Thompson v. Thompson, supra; Bencomo v. Bencomo*, Fla., 200 So.2d 171, cert. den. 88 S.Ct. 466, 389 U.S. 970, 19 L.Ed.2d 461).

III.

Assuming that 18 U.S.C. §§2510-2520 otherwise applies to the facts of this case, as a matter of legislative intent, the conduct of respondent upon which this action is based is not prohibited, because the petitioner will be held to have given prior consent to respondent, as her husband, to intercept wire communications in the marital domicile to which petitioner was a party.

It is provided in 18 U.S.C. §2511 (2) (d) that the Act is not applicable where one of the parties to a wire communication "has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act." The District Judge ruled that, as the Respondent was the head of the marital domicile, and was the subscriber to the telephone service, and Petitioner's husband, Petitioner would be deemed as a matter of law to have consented under the circumstances to the alleged interception of her wire communications, and that, as Respondent had committed no tort against Petitioner, there was no violation of the Act.

Although the law now regards husband and wife as equal, it does not yet regard them, and their usual and proper places in society, or in the marital status, as occupying pre-

cisely the same positions. As a practical matter, one of the partners to a marriage must be regarded, in law, as the person exercising the primary responsibility for t . order and governance of the household. Such person continues to be the husband—in legal theory, if not, perhaps, always in fact. As the head of the household, and, in law, the dominant party to the marriage, vicarious liability is still imposed upon the husband by Alabama law for the acts of his wife under some circumstances, despite the destruction by the Married Women's Act of the legal fiction of unity of the person which existed at common law.

As the head of the household, Respondent had the right to control, and presumably did control, the use of the family telephone. Respondent was the subscriber to the telephone service provided for him and his family. Therefore, it would seem that if he consented to interception of communications over his telephone, such consent would carry with it the implied consent of his wife, as the trial court held, just as, in applying the Communications Act of 1934, the courts have held that consent is presumed in situations where the circumstances do not *justify* an expectation of privacy *(Bubis v. United States, supra).*

Respondent did not intercept Petitioner's communications "for the purpose of committing any tortious act." He had a perfect right, legally and morally, to obtain any information he could concerning Petitioner's suspected infidelity. As for the "purpose of committing any other injurious act" clause of the exemption [18 U.S.C. §2511 (2) (d)], the clause is so vague, indefinite, and uncertain with respect to the kind of "injurious" act contemplated, that, at least in a criminal statute such as the "Wiretap Act", the clause would violate due process and be void. No judge could define the word in instructing a jury except in terms of a specific tort or crime, and, if the jury were not con-

fined by proper instructions, it would be the jury which would be interpreting the law, and not the court.

IV.

Assuming that 18 U.S.C. §§2510-2520 otherwise applies to the facts of this case, as a matter of legislative intent, respondent is not subject to suit by petitioner because the suit is barred under Alabama law under the doctrine of interspousal immunity.

The cause of action enacted by 18 U.S.C. §2520 is not an action for injuries to person, property, or reputation. The statutory law of Alabama provides, in substance, that a wife must sue alone for injuries to her *person, property,* or *reputation.* Therefore, if this action is not maintainable under Alabama law, it is not maintainable at all, unless 18 U.S.C. §2520 overrides state law.

Petitioner asserts in her brief that "the laws of the State of Alabama do not provide for interspousal immunity." (Petitioner's Brief, pp.11-12). In general, the statement is true, but in particular, applied to the facts of this case, the statement is not true. The trial court agreed with the Respondent that, with respect to the cause of action enacted by 18 U.S.C. §2520, the doctrine of interspousal immunity would apply in Alabama. See Appendix. No appellate court of Alabama has passed on the question, although it is conceded that there is language in certain decisions of Alabama appellate courts indicating that the doctrine of interspousal immunity has been abolished. Such language was, however, written in the context of cases involving injuries to person, property, or reputation. This Court is not in as good a position to interpret Alabama law as was the trial court on a question with respect to which an Alabama appellate court had never ruled. Nevertheless, this Court has

held, in interpreting a federal law (District of Columbia) in derogation of the common law, and similar in its wording to that of the Alabama Married Women's Act, that such a statute must be strictly construed. *Thompson v. Thompson, supra.* Absent a very liberal construction of the Alabama Married Women's Act, Petitioner cannot maintain this suit unless 18 U.S.C. §2520 overrides the Alabama statute, and overrides the laws of other states where the doctrine of interspousal immunity would otherwise bar a suit of this nature. There is no indication in the legislative materials pertaining to the current "Wiretap Act" that Congress so intended, and, in the absence of strong evidence that it did so intend, the presumption should be to the contrary. *Thompson v. Thompson, supra.*

V.

Assuming that 18 U.S.C. §§2510-2520 applies to the facts of this case, the trial court properly directed a verdict in favor of respondent because of the absence of substantial evidence at the trial tending to prove two elements of petitioner's cause of action, viz: (1) that the intercepted communications were made through the use of facilities "furnished or operated by any person engaged as a common carrier and providing or operating such facilities for the transmission of interstate or foreign communications" [18 U.S.C. §2510(1)] and (2) that no party to an intercepted communication had given his consent to the interception [18 U.S.C. §2511(2)(d)].

The only evidence in this case of "intercepted" wire communication is that Respondent "tapped one of the telephones in his home," or that he "tapped" the wire leading to or from one of his telephones. There was no mention in

the testimony of the name of the person, firm or corporation which provided the telephone service. There was no evidence that the "intercepted" communications were made through the use of facilities "furnished or operated by any person engaged as a common carrier," or that the facilities were operated "for the transmission of interstate or foreign communications." 18 U.S.C. §2510(1). Such are essential elements of the crime enacted by the "Wiretap Act", and essential elements of the civil cause of action enacted by 18 U.S.C. §2520.

It is fundamental and elementary that the plaintiff, in either a civil or criminal action, is not entitled to a favorable verdict unless there is substantial evidence to support an inference of the existence of every element of the cause of action. The defendant has no duty in either a criminal or civil case to assist the plaintiff in carrying his burden of proof. Neither a judgment of conviction in a criminal case, nor a judgment for the plaintiff in a civil case, may be based upon mere conjecture, guess, surmise or speculation. A judgment must be based on *evidence*, and here there was none.

The precise failure of proof as occurred in this case occurred in *United States v. Blattel* (1972), 340 F.Supp. 1140. The District Court held that the evidence did not sustain a conviction under 18 U.S.C. §§2510-2520. *Blattel* is directly in point with the present case, and if *Blattel* was correctly decided, the trial judge correctly granted Respondent's motion for a directed verdict in this case.

The enacting clause of the "Wiretap Act" begins with the clause "(1) Except as otherwise specifically provided in this chapter [§§2510-2520 of this Title] any person who . . ." Immediately following the clause just quoted, the Act defines the substantive offenses which are prohibited. Therefore, by reference in the Act in the enacting

clause above quoted, to the exceptions under which the Act has no application, the excepting clauses, including 18 U.S.C. §2511 (2) (d), are incorporated by reference into the enacting clause of the Act itself, and the Plaintiff would have the burden of proving the non-existence of the exception.

Although there was evidence in this case that Petitioner did not give her actual consent to the interception, there was a complete absence of evidence at the trial that the other parties to the communications did not consent. Non-consent cannot simply be assumed, in view of Petitioner's burden of proof. The trial court did not err in directing a verdict for Respondent, irrespective of its reason for doing so.

REASONS FOR DENYING WRIT — ARGUMENT

I.

To apply the criminal and civil sanctions of 18 U.S.C. §§2511, 2520, to the facts of this case would violate the fundamental principle of statutory construction that every statute must be interpreted and applied in the light of reason and understanding to reach the results intended by the legislature.

The principal thrust of Petitioner's argument is her contention that the words "any person", as used in 18 U.S.C. §2511, are to be given a literal and all-inclusive construction, without exception other than those expressly provided by the statute, "without implied exceptions," and irrespective of consequences, and Petitioner accuses the Court of Appeals of having "fabricated a uniform, non-congressionally authorized standard for interpreting the civil liability provisions of the wiretap statute" (Petition-

er's Brief, p.12). Petitioner thus contends that if the Legislature inadvertently uses words in a statute which creates a new, statutory felony, and those words, on their face, apply to certain human conduct, it is just regrettable if a citizen is prosecuted, convicted and sentenced to a term of years in a penitentiary for such conduct, whether or not the Legislature intended to prohibit and make a crime of such conduct, and whether or not the possibility of such conduct had even occurred to the Legislature when it enacted the statute. Petitioner says in effect that the courts must apply not the *Act* of the Legislature, but the document *evidencing* the Act, and ignore all other evidence of the legislative intent, including common sense and justice. For society to imprison a citizen for a term of years, and to stamp him as a felon, merely because of loose wording of a criminal statute, or because it simply did not occur to the Legislature to specifically exempt certain acts from the statute which it would have exempted if the possibility of such acts had occurred to the Legislature, would not only be contrary to the public interest, and pervert the intention of the Legislature, but would be contrary to morals, decency, and the principles of a civilized society.

The statute upon which the suit in this case is based (18 U.S.C. §2511) is a criminal statute, although 18 U.S.C. §2520 also gives a civil right of action in favor of certain persons against one who violates the criminal statute. There can be no civil liability unless there is also criminal liability. 18 U.S.C. §2511 and 18 U.S.C. §2520 are inseparable. If Respondent is liable to Petitioner under 18 U.S.C. §2520, he is liable to the Government in a criminal prosecution for violation of 18 U.S.C. §2511. The construction and interpretation of the statute with which we are here concerned must, therefore, be undertaken as if the statutes were criminal statutes only.

A fundamental rule of construction of criminal statutes is that they are to be strictly construed, and if there is a doubt with respect to the applicability of the statute to a particular case, the doubt must be resolved in favor of the accused. The rule is so fundamental and basic to our system of jurisprudence that it has been stated and reiterated in thousands of cases by the appellate courts of the United States and of the states of this Union. The appellate court below placed strong emphasis upon the rule in its opinion, and, after finding the legislative history of the statutes involved to be inconclusive, referred to it as a "basic due process principle", saying that "criminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed."

Although it appears from the opinion of the appellate court below that it did, as it said, make a long and exhaustive search of legislative materials in the attempt to determine the legislative intent of 18 U.S.C. §§2510-2520, it found such materials "inconclusive", considered alone. Respondent submits that the appellate court, upon finding that the legislative materials alone were inconclusive, might well have gone farther and considered the interpretations which the courts gave to §605 of the Communications Act of 1934 and not merely have considered the legislative materials alone.

The provisions of the Omnibus Crime Control and Safe Streets Act with which we are here concerned in practical effect merely revised portions of the Communications Act of 1934. (47 U.S.C. §605). The cited section of the Act contained the following provision:

> "* * * and no person not being authorized by the *sender* shall intercept any communication and divulge or publish the existence, contents, substance, purport,

effect or meaning of such intercepted communication to any person * * *."

It is apparent that, on its face, the above quoted statute is equally broad, equally sweeping, equally all-inconclusive, as the statute upon which this suit is based. The words "no person" are employed, whereas, in 18 U.S.C. §2511, the words "any person who" are employed. The Act expressly prohibits the interception of a wire communication without the authorization of the *sender*. On the face of the statute, it would apply if the *receiver* authorized the interception, or if the the receiver caused the communication to be intercepted before he received it. The prohibition of the statute, on its face, applies whether or not the sender has a reasonable expectation that the communication will be private, and irrespective of whether or not he should, as a matter of common sense, be entitled to a reasonable expectation of privacy. Criminal penalties were provided for violation of the statute. (47 U.S.C. §501). The Act was not, however, literally applied by the courts which interpreted it, including the Supreme Court of the United States. It was applied "in the light of reason." For example, in *Rathbun v. U. S.*, 355 U. S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134, decided December 9, 1957, the defendant was prosecuted under a federal indictment for transmitting an interstate communication which threatened the life of one Sparks in order to obtain a stock certificate which Sparks held as collateral for a loan. Testimony by police officers who had listened to a telephone conversation between the defendant and Sparks was admitted into evidence. The police officers had listened to the conversation on a telephone extension in another room of Sparks' home than that in which the conversation occurred. They had Sparks' permission to listen to the conversation. The defendant had placed a call to Sparks, and therefore was the "sender"

under §605 of the Federal Communications Act. The defendant, on appeal after conviction, contended that the testimony of the police was inadmissible against him because he, the "sender" of the communication, did not consent to the interception. Chief Justice Warren, speaking for this Court, held otherwise, rejecting a literal and strict construction of the statute. The Court remarked that "*every statute must be interpreted in the light of reason and common understanding to reach the results intended by the Legislature . . . that principle would be violated if we attributed to Congress acceptance of the results that would occur here from the position argued by petitioner.*" (Emphasis supplied.) The Chief Justice went on to say: "The error in accepting petitioner's argument is brought into sharper focus by the fact that §605 is penal in nature, the first violation being punishable by a fine of not more than ten thousand dollars or by imprisonment for a term not exceeding one year, or both. For example, it follows from petitioner's argument that every secretary who listens to a business conversation at her employer's direction in order to record it would be marked as a potential federal criminal. It is unreasonable to believe that Congress meant to extend criminal liability to conduct which is wholly innocent and ordinary."

It has further been held that the recording by a telephone company of the fact of a call between two of its telephones is not an unauthorized "interception" of a communication which is forbidden by §605 of the Federal Communications Act of 1934, "which was not intended to proscribe long-standing reasonable business practices of communications companies." *United States v. Gallo* (C.C.A.N.Y.) 123 F.2d 229; *DiPiazza v. United States*, 415 F.2d 99, cert. den. 91 S.Ct. 1606, 402 U.S. 949; *Deming v. United States*, 91 S.Ct. 1606, 402 U.S. 949, 29 L.Ed.2d 119.

In *Bufalino v. Michigan Bell Telephone Company*, 404 F.2d 1023, cert. den. 89 S.Ct. 1468, 394 U.S. 987, 22 L.Ed.2d 763, it was held that the Communications Act of 1934 was not "intended" to prevent a telephone company from installing, repairing, or testing its lines, though private communications might be intercepted thereby.

In *Bubis v. United States* (C.C.A.Cal. 1967), 384 F.2d 643, it was held that §605 of the Communications Act of 1934 did not prohibit a telephone company from monitoring a subscriber's calls, if the subscriber used the system's facilities in a manner which reasonably justified the company's belief that he was violating his subscription rights, for, in such event, the subscriber would be "deemed" to have consented to the monitoring to an extent reasonably necessary for the company's investigation.

It was further held in *United States v. Beckley*, (D.C.Ga. 1965), 259 F.Supp. 567, that the Communications Act of 1934 did not prohibit a telephone company from monitoring its own lines, and it did not deprive the company of the right to employ reasonable means to detect and prevent violations by its own employees.

In a case where a telephone company's toll slips of telephone calls to the defendant's home were admitted into evidence against him in a criminal prosecution for violation of the Federal Interstate Gambling Statute, it was held that §605 of the Communications Act of 1934, *as amended by the Omnibus Crime Control and Safe Streets Act of 1968*, "must be interpreted in the light of reason and understanding to reach the results intended by the Legislature," and therefore the toll slips were properly admitted into evidence. *United States v. Covello* (C.A.2) 410 F.2d 536, cert. den. 90 S.Ct. 150, 396 U.S. 879, 24 L.Ed.2d 136, Rehear. den. 90 S.Ct. 897, 397 U.S. 929, 25 L.Ed.2d 110.

It is clear from the cases above referred to that, in the interpretation and construction of the Communications Act of 1934, the courts chose to enforce the Act, and not merely the written evidence of the Art as reflected upon the face of the statute. The courts did not presume that Congress intended injustice and oppression, but that it intended justice and reason. They limited the field of operation of the Act to circumstances where the party to a wire communication had a reasonable expectation of privacy and "a right to complain" as stated by Chief Justice Warren in *Rathbun, supra.* It is further observed that Congress, in §2511 of Title III of the Omnibus Crime Control Act, which, as has been stated, in effect only revised §605 of the Communications Act of 1934, expressly incorporated therein several of the "exceptions" of the 1934 Act which the federal courts had found to impliedly exist therein, and Congress thereby impliedly approved and adopted the judicial interpretations which the courts had previously given to §605 of the Communications Act of 1934. Such include: (1) an interception of a wire communication by a communications common carrier in its normal course of business [18 U.S.C. §2511 (2) (a) (i)]; (2) the interception of a wire communication by a person who is a party to the communication, or by a person to whom one of the parties to the communication has given his prior consent to do so [18 U.S.C. §2511 (2) (d)], and (3) an interception by use of an extension telephone furnished to the subscriber or user by the communications common carrier in the ordinary course of its business, and used by the subscriber or user in the ordinary course of its business [18 U.S.C. §2510 (5) (a)]. Such "exceptions" are illustrated by the authorities above cited.

In enacting 18 U.S.C. §§2510-2520, Congress was not dealing with a subject with which it had not dealt before.

It acted in the context of the applications and interpretations given by the judiciary to the Communications Act of 1934, including that given in *Rathbun v. United States, supra,* and similar holdings that the Communications Act would be "interpreted in the light of reason and understanding to reach the results intended by the Legislature," and that the Act would not be extended to "conduct which is wholly innocent and ordinary." Congress acted in the light of judicial interpretations of §605 of the Communications Act of 1934, the common thread of which was to apply the Act reasonably, and to refuse to apply the punitive provisions of the Act unless a party to a wire communication was justified in an expectation of privacy. *Rathbun v. U. S., supra.*

Throughout history, recorded and unrecorded, the family has been the basic unit of civilized societies and of most pagan societies. A man and his wife, or mate, are the core, or nucleus, of the family structure, and the attitude of the other members of society, whether reflected in rules of law or not, has always been to regard the man and his mate as a unit within the family unit. The roots of our own society are in our Judeo-Christian heritage. Many members of our society still continue to believe that the marriage of a man and a woman, begun by a ceremony, and often by a ceremony regarded by the participants as a sacred religious sacrament, is itself a sacrament, and the common law regarded the husband and his wife as one person for most purposes, as did the Church. Adultery, in the societies in which our own society has its roots, was regarded as a serious crime against the state, and against God, and at various points in history the offense was punishable by death.

Despite the permissiveness of American society today, most people still regard marital infidelity as the most extreme affront and wrong one spouse, and his or her lover,

can commit against the other partner to the marriage. Ordinarily, when the offended spouse becomes suspicious of infidelity on the part of the other spouse, he or she will attempt to determine the truth. If the truth establishes innocence, the marriage is saved. If it establishes guilt, the guilt will be brought into the open, at least as between the parties, and the innocent spouse will either forgive the affront, or will proceed to enforce his or her legal rights. Either way, the consequences to the guilty party, if any, come about because of disclosure of truth. The innocent spouse indisputably has the legal and moral right to take all reasonable measures to determine what the truth is. The question here is whether or not Congress has found that the public interest demands that a husband (or wife) who monitors the family telephone, to which service he (or she) is the subscriber, by electronic or mechanical means, and who does so innocently, for the purpose of determining his (her) wife's (husband's) relationship with her (his) suspected lover, shall be subject to imprisonment for a term of years, and that he (she) be further punished by compelling him (her) to pay money to his (her) wife (husband) because of the act. If so, Congress has determined to harshly punish the citizen who is morally innocent of wrongdoing, and to reward the adulterer, or adulteress, for his or her sin, and the Congress has further determined that the public interest additionally requires that like punishment be inflicted upon any member of the family unit, living with his parents, brothers, sisters or children, who intercepts a wire communication over the family telephone, to which any other member is a party, unless, of course, the interception was accomplished merely by picking up an extension telephone furnished by the telephone company. Congress did not intend such an absurdity. Congress intended the statute under consideration to be interpreted

as was the Communications Act of 1934, that is "in the light of reason and understanding," so as to restrict the Act to those situations where the circumstances *justify* an expectation of privacy. *Rathburn v. U.S., supra; U.S. v. Gallo, supra; DiPiazza v. U.S., supra; Bubis v. U.S., supra; U.S. v. Beckley, supra; U.S. v. Covello, supra.* There are not, and cannot be, circumstances *justifying* an expectation of privacy of telephone communications by members of a family unit vis-a-vis each other, if the communications are over the family telephone, and the members of the family live together in a common dwelling house. In particular, Congress could not have intended to create a right of privacy in favor of a husband against his wife, or in favor of a wife against her husband, living together as husband and wife, in a common household, and involving use of the family telephone. Neither party to marriage, the most personal and intimate relationship known to our society, and a relationship regarded by many as merging the two parties into "one flesh", by sacrament of the Church, can have any reasonable expectation of privacy with regard to the other, and Congress did not intend to involve the Federal Government and its criminal and civil process in such a relationship.

As stated in the opinion of the Court of Appeals (Appendix 12a, Petitioner's Brief), there is no (express) statutory requirement of an expectation of privacy in wire communications, although 18 U.S.C. §2510 (2), in defining "oral communication", provides:

> "(2) 'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;"

Respondent has heretofore pointed out that the case law interpreting §605 of the Communications Act of 1934 holds

that there is no violation of the Act unless the "intercepted" communication is *under circumstances justifying an expectation of privacy*, despite the fact that, on its face, §605 is not so qualified. It would make little sense for Congress to require that there be circumstances justifying an expectation of privacy before interception of oral communication is a crime, and not have a like requirement for making criminal an interception of a wire communication. The reason that it did not expressly provide such requirement in the statute with which we are here concerned, in the case of wire communications, was doubtless because the draftsmen of the Act were familiar with the judicial interpretations of the 1934 Act.

In further consideration of the question of legislative intent, Respondent points to the fact that, at common law, because of the legal fiction that husband and wife are one person, and for reasons of public policy, one spouse could not sue the other in tort, though the tort was willful. The Married Women's Acts have, of course, in various degrees in the different states of the Union, removed the disability. Some states have partially removed the disability by statute, retaining the common law disability with respect to certain torts. Others have removed the disability with respect to certain torts. Others have removed the disability generally, but, by statute, have specifically retained the disability with respect to some torts. At common law, the disability extended to suits during a separation or after divorce for torts committed during coverture (42 C.J.S., *Husband and Wife*, §543; 41 Am. Jur.2d, *Husband and Wife*, §527, p.448).

The statute upon which the Petitioner in this case bases her alleged cause of action creates a new statutory cause of action in tort in favor of a person whose wire or oral communication is intercepted, disclosed, or used, in viola-

tion of the statute. The statute in effect creates a new federal right of action for breach of the right of privacy under the circumstances defined by the statute.

If 18 U.S.C. §§2510-2520 is applicable to the facts of this case, one of two results must necessarily follow: (1) the statute overrides the laws of the respective states which have not yet removed the common law disability of one spouse to sue the other in tort, or which have retained the disability by statute, thus permitting suit in tort by one spouse against the other for violation of the Act, despite the law of the state retaining the disability, or (2) one spouse may sue the other for violation of the Act in those states which have removed the common law disability, but he may not sue in those states which have retained the disability. It is not likely that either result was contemplated by Congress, for the reason that it is improbable that Congress wished to enact a federal law, which, in practical effect, would override deeply entrenched state policies regarding the marital status, or, in the alternative, that Congress would adopt a statute which would not have uniform effect throughout the country. It would, then, appear to follow that the Act has no application or field of operation to the facts of this case.

Analysis of the opinion of the appellate court below reveals that its reservations with regard to its decision are based solely upon the sweeping langauge of the Act, not the legislative materials which it examined and found to be of little assistance in interpreting the intent of Congress. The appellate court not only found "no direct indications that Congress intended so much", but also "only several scattered suggestions that it was aware that the statute's inclusive language might reach this case." Respondent submits that the dearth of suggestions in the legislative history that it had even occurred to Congress that someone might

attempt to extend the Act to personal acts of husband and wife in their marital home is an indication of intent by Congress not to do so; otherwise, there would have been a great deal of controversy concerning the question. It is further noted that, during the Committee hearings, Prof. Herman Schwartz, appearing for the American Civil Liberties Union, which represents the Petitioner in this case, remarked that:

> "I take it nobody wants to make it a crime for a father to listen in on his teen-age daughter *or some such related problem . . .*" (Emphasis supplied) Appendix 13a, Petitioner's Brief

If the appellate court below had given consideration to the interpretations of §605 of the Communications Act of 1934, it would not have entertained reservations about not giving literal application to the Act under consideration. *Rathbun v. U.S., supra,* and other authorities cited.

II.

It is not a violation of the constitutional guaranty of "equal protection of the laws" for Congress to enact certain rights of privacy in favor of citizens generally, and to fail to provide for such rights in favor of one spouse against the other, where the two are living together as husband and wife in one marital domicile.

Petitioner contends that an interpretation of 18 U.S.C. §§2510-2520 which would not give Petitioner a right of action against Respondent would violate her Fifth Amendment rights. Respondent does not consider the contention to raise a substantial constitutional question, nor did the appellate court below.

At the heart of Petitioner's contention is her view that the denial to her of a right of action against Respondent

would not have "any appropriate relationship to any proper governmental objective" (Petitioner's Brief, pp. 13-14), and "privacy extends to individuals *qua* individuals, and not to single people as individuals and married people as a unit" (Petitioner's Brief, page 17).

First, let it be emphasized that 18 U.S.C. §§2510-2520, does not purport to take away from Petitioner any right of action she would have enjoyed before the enactment of the statute. The statute confers and creates a federal right of action for conduct as to which a right of action did not exist theretofore, unless by state statute. Any rights Petitioner had under state law for "breach of privacy", or otherwise, before the passage of the Act, she still has. Congress simply did not choose to extend to her a new federal cause of action, just as, if the situation were reversed, the Respondent would not have a federal cause of action against Petitioner. The statute does not discriminate between the sexes. It merely does not create a cause of action by one spouse against another for breach of privacy rights which do not exist unless those rights are created by statute. Petitioner's contention that government must treat married persons precisely the same as single persons, even in their relationships with each other, approaches the absurd. Petitioner would have this Court, as a matter of federal constitutional law, abolish all common law and statutory disabilities of one spouse to sue another in tort, for if "equal protection of the law" requires the statute to be extended to confer a right of action upon Petitioner in this case, it necessarily follows that "equal protection" nullifies the disabilities of one spouse to sue the other under state law. The social implications and the political implications of such a ruling would be awesome indeed.

In *Bencomo v. Bencomo*, Fla., 200 So.2d 171, cert. den. 88 S.Ct. 466, 389 U.S. 970, 19 L.Ed.2d 461, a wife brought

suit against her former husband for a tort allegedly committed during marriage. The marriage had been dissolved by divorce. It was contended by the plaintiff that she had a right to maintain the suit under the Fifth and Fourteenth Amendments to the United States Constitution, despite the fact that under Florida law one spouse cannot sue the other in tort. Plaintiff also contended that she had a right to maintain the suit by virtue of Florida statute. The Florida Supreme Court rejected both arguments, and cited in support of its decision *Thompson v. Thompson,* 218 U.S. 611, 31 S.Ct. 111, 112, 54 L.Ed. 1180.

In *Thompson v. Thompson,* cited *supra,* the plaintiff brought suit for damages against her husband for willful assault upon her person by the husband. The case was filed in the District of Columbia, and involved construction of a federal statute which expressly removed certain disabilities of married women to sue separately from their husbands. This Court held that the statute was not intended to give a right of action in favor of the wife as against her husband, but to allow the wife, in her own name, to maintain actions in tort, which, at common law, must be brought in the joint names of the wife and husband. This Court, in support of its decision, said:

> "This construction would, at the same time, open the doors to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander, and libel, and alleged injuries to property of the one or the other, by husband against wife, or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it . . .
>
> *It must be presumed that the legislators who enacted this statute were familiar with the long-established*

policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the Legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention . . .

We can but regard this case as another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration.

We do not believe it was the intention of Congress, in the enactment of the District of Columbia Code, to revolutionize the law governing the relation of husband and wife as between themselves. *We think the construction we have given the statute is in harmony with its language, and is the only one consistent with its purpose.*" (Emphasis supplied)

In *Nicholson v. Atlas Assurance Corporation* (La. App.), 156 So.2d 245, a wife brought suit against her husband for injuries sustained by reason of the husband's alleged negligence in the operation of an automobile. The wife contended that the Louisiana statute, which denied the right of a wife to sue her husband, but did not deny the right of the husband to sue his wife, was unconstitutional. The Court of Appeals of Louisiana, Fourth Circuit, held otherwise, saying that "the suspension of her right to sue during marriage results from the contract of marriage and is a reasonable exercise of the state's power to regulate the marriage status."

As expressed by the Court of Appeals of Louisiana, Fourth Circuit, in *Nicholson v. Atlas Assurance Corpora-*

tion, supra, the disabilities of one spouse to sue the other "results from the contract of marriage." The marriage ceremony does not, as asserted by Petitioner in her Brief, "have the effect of penalizing the exercise" of the right granted by the Federal Wiretap Statute "by making the marriage ceremony an *involuntary* (emphasis supplied) renunciation of the statutory protection against certain forms of invasion of privacy." A marriage is voluntary, not involuntary, and, by entering into the marriage contract, both parties agree to the disabilities and responsibilities which the law imposes upon the parties, as well as the advantages. There is no constitutional issue in this case.

III.

Assuming that 18 U.S.C. §§2510-2520 otherwise applies to the facts of this case, as a matter of legislative intent, the conduct of respondent upon which this action is based is not prohibited, because the petitioner will be held to have given prior consent to respondent, as her husband, to intercept wire communications in the marital domicile to which petitioner was a party.

It is provided in 18 U.S.C. §2511 (2) (d) that the Act is not applicable where one of the parties to a wire communication "has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act."

The district court judge ruled that, as the Respondent was the head of the marital domicile, and was the subscriber to the telephone service, and Petitioner's husband, Petitioner would be deemed as a matter of law to have consented under the circumstances to the alleged interception of her wire communications, and that, as Respondent had

committed no tort against Petitioner, there was no violation of the Act.

The appellate court below expressed the view that the above-quoted exemption did not apply, saying:

> "We think this inapposite for two reasons. First, the exemption requires consent of a 'party to the communication,' and 'party' would mean the person actually participating in the communication . . .
>
> Secondly, even if we were to hold that the husband is capable of consenting for the wife, or that the wife's use of the marital home's phone implied consent to be overheard by the husband, the consent would be vitiated by the purpose of committing an 'injurious act.' See 114 Cong. Rec. 14694 (1968), where this proviso is stated to reach consensual recordings, made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him." (Petitioner's Brief, 4a)

Respondent cannot agree with the lower appellate court, which seemed to hold that the "consent" element of the exemption would have to be the Petitioner's own, personal consent, and not implied as a matter of law.

It is conceded that the special privileges and the special responsibilities which the law once conferred upon the partners to a marriage have, in large measure, disappeared. Nevertheless, although the law now regards husband and wife as "equal", it does not yet regard them and their usual and proper places in society, or in the marital status, as being precisely the same. As a practical matter, one of the partners to a marriage must be regarded, in law, as the person exercising the primary responsibility for the order and governance of the household. Such person continues to be the husband in probably every state of the Union — in legal theory, if not, perhaps, in fact. As the head of the house-

hold, and, in law, the dominant party to the marriage, vicarious liability is still imposed upon the husband by the law of Alabama for the acts of his wife under some circumstances, despite the destruction by the Married Women's Acts of the legal fiction of unity of the person which existed at common law. For example, in *Strouse v. Leipf*, 101 Ala. 433, 14 So. 667, which was a suit brought against the husband for injuries caused by a known vicious dog kept upon the premises, the husband was held liable merely because, as head of the family, he was deemed to have control of the premises. Another example is the imputation of negligence to the husband if his wife is negligent in operating her own automobile, in which her husband is a passenger.

As the head of the household, Mr. Simpson had the right to control, and presumably did control, the use of the family telephone. Moreover, Mr. Simpson was the subscriber to the telephone service provided for him and his family. Therefore, it would seem that if he consented to an interception of communications over his telephone, such consent would carry with it the implied consent of his wife, as the trial court held, just as, in applying the Communications Act of 1934, the courts have held that consent is presumed in situations where the circumstances do not *justify* an expectation of privacy. *Bubis v. United States, supra.*

Respondent did not intercept Petitioner's communications "for the purpose of committing any tortious act." The Wiretap Act aside, he had a perfect right to obtain any information he could concerning Petitioner's suspected infidelity. If his purpose was either to confirm or to allay his own suspicions, as he testified (T-142), or if his purpose was to place himself in a better legal position in the event of a divorce, or even to reveal the truth of Petitioner's infidelity to the parties' relatives and friends, there was no purpose to commit a tort, for such would not be tortious

under Alabama law. There was no disclosure of Petitioner's wire communications to "neighbors", as erroneously stated in the opinion of the lower appellate court, although such would be irrelevant in any event.

As for the "purpose of committing any other injurious act" clause of the exemption, the clause is so vague, indefinite, and uncertain with respect to the kind of "injurious" act contemplated, that, at least in a criminal statute such as the Wiretap Act, the clause would violate due process and be void. No judge could define the word in instructing a jury except in terms of a specific tort or crime, and, if the jury were not confined by proper instructions, it would be the jury which would be interpreting the law and not the court.

IV.

Assuming that 18 U.S.C. §§2510-2520 otherwise applies to the facts of this case, as a matter of legislative intent, respondent is not subject to suit by petitioner because the suit is barred by Alabama law under the doctrine of interspousal immunity.

Petitioner asserts in her Brief that "the laws of the State of Alabama do not provide for interspousal immunity." (Petitioner's Brief, pp. 11-12). In general, the statement is true, but in particular, under the facts of this case, the statement is not true, and *the trial court so held.* The appellate court below did not comment on the question, and no appellate court of Alabama has specifically passed on the question of whether the doctrine applies to a statutory cause of action such as this one, which is not, in reality, an action for breach of privacy, nor has any Alabama appellate court passed on the question of whether the doctrine applies to a common law action for breach of right of privacy.

The statutory law of Alabama provides, in substance, that a wife must sue alone for injuries to her *property*, her *person*, or her *reputation*. *Code of Alabama 1940*, Title 34, §72. Although there is language in a number of opinions by appellate courts of Alabama indicating or saying that the doctrine of interspousal immunity has been abolished in Alabama, the statements therein were made in the context of the facts of those cases, which were cases involving injuries to property, persons, or reputation. The cause of action created by 18 U.S.C. §2520 is not for injury to property, person, or reputation, nor is the common law action for breach of right of privacy, which is a separate and distinct cause of action, with different elements than those in the present case. 18 U.S.C. §2520 is merely punitive in nature, although compensable damages are allowed if any actual damage can be shown, whereas the gist of a common law action for breach of right of privacy is not for injury to personal property, and is not for injury to character or reputation, but is for direct wrongs of a personal character, resulting in injury to the feelings, without regard to any effect which the publication may have on the standing of the individual in the community. *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534; *Norris v. Moskin Stores, Inc.*, 372 Ala. 134, 132 So.2d 321; *Abernathy v. Thornton*, 363 Ala. 496, 83 So.2d 235; 62 Am.Jur.2d, *Privacy*, §44. The common law disabilities remain unless, by statute, the disabilities are clearly intended to be removed. *Thompson v. Thompson*, 218 U.S. 611, 31 S.Ct. 111, 112, 54 L.Ed. 1180; *Bencomo v. Bencomo, supra.*

The great majority of the states still retain interspousal immunity from suit to a greater or less degree. Because of principles of federalism it is unlikely that Congress intended the Wiretap Act to override the laws of the states by authorizing suits brought by one spouse against the

other under 18 U.S.C. §2520 in those states which have not abolished interspousal immunity from such suits. The action in the present case not being one for injury to person, property or reputation, it is not allowable in Alabama unless, as a matter of statutory construction, 18 U.S.C. §2520 is held to override Alabama law, and the laws of other states where the doctrine of interspousal immunity would otherwise bar a suit of this nature.

V.

Assuming that 18 U.S.C. §§2510-2520 applies to the facts of this case, the trial court properly directed a verdict in favor of respondent because of the absence of substantial evidence at the trial tending to prove two elements of petitioner's cause of action, viz: (1) that the intercepted communications were made through the use of facilities "furnished or operated by any person engaged as a common carrier and providing or operating such facilities for the transmission of interstate or foreign communications" [18 U.S.C. §2510(1)] and (2) that no party to an intercepted communication had given his consent to the interception [18 U.S.C. §2511(2)(d)].

It is fundamental and elementary that, in a criminal case, a conviction may not be had, as a matter of law, and there is no question of fact for a jury to decide, unless substantial evidence has been admitted at the trial which would authorize the jury to reasonably infer the existence of every essential element of the crime charged. It is an equally fundamental principle of law that, in a civil action in the federal courts, a plaintiff cannot recover, as a matter of law, and there is no question of fact for a jury to decide, unless there has been substantial evidence admitted at the trial, or ad-

mitted in the pleadings, of the existence of each and every essential element of the plaintiff's cause of action. A defendant in either a criminal or civil case has no obligation or duty to the complaining party or to the court to assist the plaintiff in carrying the burden of proof.

An essential element of the plaintiff's cause of action in this case is that the communications which Mr. Simpson allegedly intercepted be made "through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications." There was absolutely no evidence that such was the case – only proof that the Respondent "tapped" one of his telephones, or that he "tapped" the wire leading to or from one of his telephones. Not even the name of the person, firm or corporation which provided the telephone service was mentioned in the testimony. Neither a judgment of conviction in a criminal case, nor a judgment for the plaintiff in a civil case, may be based upon mere conjecture, guess, surmise or speculation. A judgment must be based on *evidence*, and here there was none.

The precise failure of proof as in this case occurred in *United States v. Blattel*, 340 F.Supp. 1140, decided March 1, 1972, by the United States District Court for the Northern District of Iowa. The defendant in the case was indicted for wiretapping in violation of 18 U.S.C. §2511 (1) (a). The defendant made a motion for judgment of acquittal at the close of all the evidence, on which the trial court reserved its ruling. The jury returned a verdict of guilty. The motion was renewed after the jury verdict and it was contended that the Government had failed to

prove two essential elements of the crime: (1) that Northwestern Bell Telephone Company was a common carrier, and (2) that the company was engaged in "providing or operating facilities for the transmission of interstate or foreign communications." The record was devoid of testimony that "Northwestern Bell Telephone Company", the telephone company involved, was either a common carrier, or that it was engaged in providing or operating its facilities for the transmission of interstate or foreign communications. The District Court held that the Wiretap Act "was intended to be comprehensive, but it clearly refers only to communications sent through the facilities of a communications common carrier, and, therefore, "wire communications," as defined in the statute, "*must be proved in order to sustain a conviction.*" (Emphasis supplied.)

It is observed that in *Blattel, supra,* there was at least evidence of the name of the company furnishing the telephone service. In the case before us, there was none.

There was no evidence that the Petitioner did not give her actual consent to the intercepted communications. There was a complete absence of evidence that the other parties to the communications did not consent. Nonconsent cannot simply be assumed.

The enacting clause of the Wiretap Act begins with the clause "(1) Except as otherwise specifically provided in this chapter [§§2510-2520 of this Title] any person who . . ." Immediately following the clause just quoted, the Act defines the substantive offenses which are prohibited. Therefore, by reference in the Act in the enacting clause above quoted, to the exceptions under which the Act has no application, the excepting clauses, including 18 U.S.C. §2511 (2) (d), are incorporated by reference into the enacting clause of the Act itself, and the Plaintiff would have the burden of proving the non-existence of the exception.

The Wiretap Act is a penal statute, and is to be strictly construed against the person invoking it. Conjecture, surmise, and speculation cannot be substituted for evidence. *U. S. v. Blattel, supra.* The burden of proof was upon the Petitioner to prove every element of her alleged cause of action. The burden was not upon Respondent to disprove the existence of any element of the cause of action until and unless Petitioner first proved its existence, at least prima facie.

The trial court did not err in directing a verdict for Respondent, irrespective of its reason for doing so.

CONCLUSION

The report of the Senate Judiciary Committee concisely states the problem 18 U.S.C. §§2510-2520 was intended to deal with in the words: "No longer is it possible, in short, for each man to retreat into his home and be left alone." *Senate Report No. 1097*, 1968 U.S. Code Cong. & Admin. News, p. 2153. Petitioner seeks a construction of the statute which would not protect the privacy of the home, but would extend the arm of Big Brother into the home, and there regulate an aspect of marital discord and conflict. The Federal Government has no business intervening in such an area, and the courts have no business permitting such intervention except by clear legislative mandate. The petition for certiorari should be denied.

Respectfully submitted,

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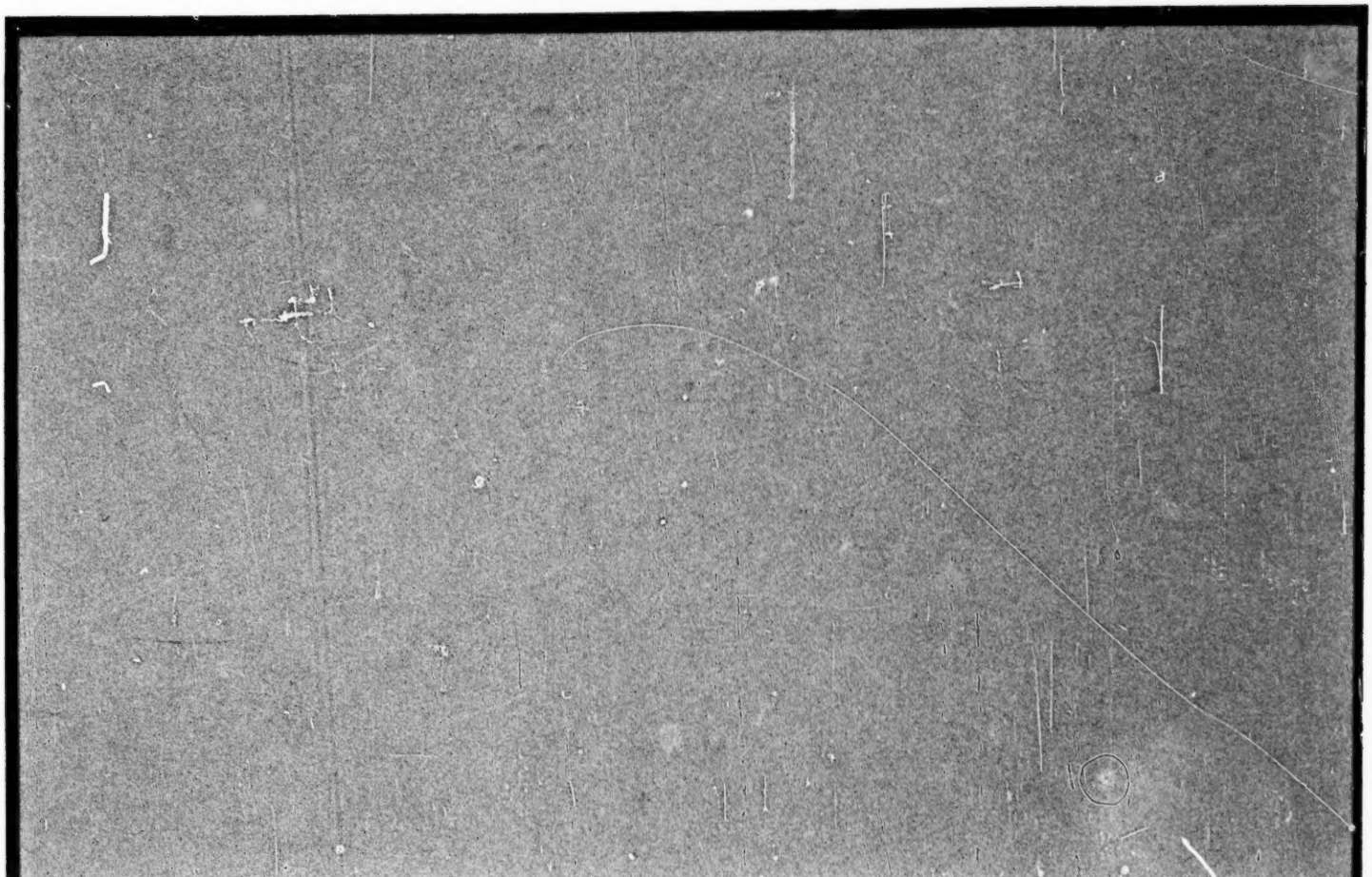
APPENDIX



INSTRUCTIONS OF TRIAL COURT TO JURY
(Tr. pp. 197-203)

THE COURT: As I told the members of the jury, this case is a case of first impression insofar as the narrow problems in this case are concerned under the federal statute. I have had the benefit of briefs from the lawyers representing the parties and a memorandum prepared by my law clerk and my own individual research.

Under the law as I construe it, the defendant is entitled to a directed verdict in this case.

Ordinarily, where that is so, I would merely grant the motion for a directed verdict and say very little about it, but you have sat here and have heard the evidence in the case and I'm sure that there are certain impressions which were made on your minds and on my own. For example, if this were a case which involved the credibility of the plaintiff on the one hand and the defendant on the other, it is my opinion that the testimony of the plaintiff, Mrs. Simpson, was worthy of more credibility than that of Mr. Simpson. I cannot escape the feeling and we are not trying the issue of domestic difficulties in this case; I cannot escape the feeling or the impression in the case that the right of the matter lay with Mrs. Simpson; on the other hand, it is a federal statute which we are required to construe and that federal statute appears in Title 18 of the United States Code, more particularly Sections 2510 and following. The provision of that statute upon which we must focus our attention is a very simple statement. "Except as otherwise specifically provided in this chapter, any person who willfully intercepts, endeavors to intercept, or procures any other person to interrupt or endeavor to intercept any wire or oral communication is guilty of a crime." And for that willful interception there is provided in the same act a pro-

vision for the recovery of civil damages and it is upon that section that the plaintiff in this case has relied. There is an exception contained in Section 2511, 2 (d) which reads as follows: "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or for the purpose of committing any other injurious act." Under that exception it seems apparent to me that the real question for decision is whether or not under all of the circumstances in this case the consent of Mrs. Simpson to the interception of a telephone communication may be implied under all of the circumstances of this case. There is no evidence from which it could be inferred that she gave her actual consent, so the question becomes one of implied consent. Except for a few torts which the Supreme Court of Alabama has discussed, it is the common law of Alabama that a wife may not bring suit against a husband for a tort committed against her by her husband. For example, it is the law of Alabama that a wife, during the existence of the marriage, may not sue her husband for slander, during the continuation of the marriage. It is also the law that if a statute provides that wife might bring suit against a husband for a tort that that provision, statutory provision, must be clear and explicit. For example, the Supreme Court of Alabama has said that a wife might sue her husband for damages for an assault and battery committed on her person, that a wife might sue her husband for negligence in the operation of a motor vehicle which results in injuries to him or to her, that a husband might sue his wife

or the wife might sue the husband for detinue for the recovery of personal property, but beyond that the appellate courts of Alabama have not extended the right of a wife to bring suit against the husband for a tort committed during what we refer to as coverture, that is, existence of the marriage, the theory of the law being that as a matter of public policy the husband and wife during marriage are deemed to have been merged into one unity.

Now, under the circumstances of this case, the facts are that the telephone was located in the common residence, that it was jointly owned, that there was an extension telephone in the same residence. I realize that the interception of oral communications covered by the statute are interceptions where one party has a reasonable expectation of privacy. That same provision does not appear with reference to the interception of wire communications. However, the exception to which I have referred turns on the issue as to whether implied consent might be found in the evidence to the interception of that wire communication about which you have heard. I have read all of the cases dealing with telecommunications that I have been able to find. The cases are not reconcilable in every area. I read the legislative history of this omnibus crimes and safe streets act. The Congress never did address itself to the problem which we have before us. It may never have occurred to the committees of the Congress dealing with this act. On the other hand, where a person is not acting under color of law, that is to say not acting as a law enforcement officer, the willful interception by such a person, a private individual, is not an offense where there has been consent by one of the parties to the communication except in those circumstances where the interception and publication of the conversation to others has been with intent to commit a tort. And, as I say, under the law of Alabama under these circumstances,

no tort was committed by the husband which could form the basis for a suit for damages by the wife since it did occur while they were living together as man and wife in a common home.

I wanted to try to explain as simply as I could the reasoning which led me to the conclusion that under the law there was no claim upon which relief can be granted under the facts and circumstances of this case.

Mr. Clerk, will you pass to one of the jurors that form of verdict to be signed by direction of the Court? And I might say to you that that's not your verdict, it's mine.